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No. 88-1528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT D. STRATMORE,
Petitioner,

v.

MICHAEL H. GOODBODY,
SHAREEF DANCER (U.S.A.) SYNDICATE,
DALHAM HALL STUD and ROBERT ACTON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

1. Introduction

In an attempt to reverse the result below, petitioner grossly distorts the issues raised by this case. Petitioner's hyperbole to the contrary notwithstanding, this case does not present—and the court of appeals did not consider—any constitutional issue or any claimed implied immunity for the thoroughbred industry from the antitrust laws.

See Questions 1 and 2 Petitioner's Petition at i. ("Pet.") The only issue raised by the petition is whether petitioner established proof in support of his antitrust claims sufficient to avoid summary judgment. *See* Question 3. Pet. at i. After considering all of the evidence upon which petitioner now relies and all of the arguments which petitioner now makes to this Court, the district court and a unanimous panel of the court of appeals concluded that petitioner had failed to raise any genuine issue of material fact and that respondents were entitled to summary judgment as a matter of law.

The conclusion reached by the courts below, based upon undisputed record evidence, is wholly consistent with this Court's recent decisions with respect to summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Indeed, there is nothing even remotely remarkable about that conclusion. This case, which involves nothing more than a failure of proof, simply does not present any issue worthy of this Court's consideration. *See* Sup. Ct. R. 17.

* * * *

This case involves certain aspects of the thoroughbred breeding industry. When a thoroughbred stallion has had a successful racing career, it is common practice for the horse's owners to retire it to stud for the purpose of breeding it with mares of equally high quality bloodlines with the objective of producing offspring which will also be successful in racing, and, ultimately, in breeding. When retiring a stallion to stud, the owners may retain their ownership interest in the horse, or, as has become a common practice, "syndicate" the horse.

Syndication is a means by which the owners of the stallion convey undivided ownership interests to others, such interests being generally described as "shares." Ownership of a share in a thoroughbred stallion gives

the owner the right to bring a mare to the stallion each annual breeding season for breeding purposes during the life of the stallion. The share owner generally has the option of using the breeding right (sometimes called a "nomination" or "season") to breed his own mare each year, or, if he chooses not to do so, to sell it to someone else who has an appropriate mare to breed. The mutual rights and duties of shareholders, provisions for the maintenance of the stallion, the manner of exercising breeding rights, and other details relating to the stallion are set forth in syndicate agreements, which may vary widely in their terms.

SHAREEF DANCER was syndicated pursuant to an agreement, drafted by English solicitors in accordance with English law, which provided for the creation of forty undivided interests, or shares, in the horse, each valued at $1,000,000. Pet. at A-2. The agreement imposed certain restrictions on the rights of shareholders to convey either their ownership interests or the resulting breeding rights in SHAREEF DANCER to others; only one provision of that agreement, ¶ 13(d), is pertinent to this litigation: "At no time shall any . . . nomination be sold at auction." *Id.*

As the courts below found, the undisputed record evidence demonstrated that the purpose of that provision is to provide a means of insuring that high-quality mares are presented to SHAREEF DANCER. *Id.* at A-8. This case arises from petitioner Robert D. Stratmore's attempt to breach both this provision of the syndication agreement, and the terms upon which he purchased a SHAREEF DANCER season, by reselling the season at auction.

Respondent Michael H. Goodbody is the Chairman of the SHAREEF DANCER Syndicate Commmittee, which, *inter alia*, oversees the affairs of the SHAREEF DANCER Syndicate and approves the quality of mares which the stallion is to service. *See id.* at A-2. Respond-

ent Robert P. Acton is the General Manager of Darley Stud Management which is the current syndicate secretary.[1] Acton performs the duties of the syndicate secretary which include managing the book of mares which are to be presented to the stallion and the day-to-day care and maintenance of the stallion. Mr. Acton also assists shareholders who may wish to sell their nominations or shares. Like Mr. Goodbody, Mr. Acton is an officer of the syndicate. *See* Pet. at A-15-A-16.

Respondent SHAREEF DANCER (U.S.A.) Syndicate consists of the owners of the 40 shares in SHAREEF DANCER. *Id.* at A-2. The shareholders include, among others, the Queen of England. *Id.* at A-13. Aside from the original syndicate secretary, Dalham Hall Stud, which is now merely the name of a farm, the defendants below are either the syndicate itself or its officers.

Trading in stallion shares or seasons is sometimes done through private, members only, organizations such as Matchmaker Breeders' Exchange, Ltd. ("Matchmaker"), which conduct sales both by means of auctions and "exchanges" in which bid or ask prices for shares or seasons can be listed. *Id.* at A-5, A-23. In 1985, Matchmaker conducted two auctions (one in January and the other in November) and a weekly bid-and-ask exchange. Participation in either the auction or the bid-and-ask exchange is restricted to Matchmaker members.[2]

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[1] Respondent Dalham Hall Stud was the original syndicate secretary. Prior to the institution of this action, however, all of the assets of Dalham Hall Stud were transferred to other entities. Since that time, Dalham Hall Stud has been merely the name of the farm in Newmarket, England where SHAREEF DANCER stands.

[2] To be eligible to join Matchmaker, one must both have a net worth of at least $200,000 and have (a) owned and managed for at least two years at least five thoroughbred horses, or (b) owned or managed for at least two years a farm that breeds thoroughbreds and boards at least five thoroughbreds, or (c) purchased or sold at

In February 1985, petitioner, who was a Matchmaker member, purchased the 1986 SHAREEF DANCER nomination which gave rise to this litigation on the Matchmaker Exchange for $100,000, no guarantee,[3] plus a $2,000 commission paid to Matchmaker. Third Amended Complaint, ¶ 13. Under the rules agreed to by its members, Matchmaker prohibits the purchase of shares or seasons with the intent of reselling them. Pet. at A-2. Accordingly, in purchasing the nomination on the Exchange, petitioner expressly warranted that he was "purchasing . . . for breeding purposes, and . . . not purchasing with a view toward resale of the . . . season"; he further warranted that he had "read and under[stood] . . . the Syndicate Agreement . . . and under[stood] that he . . . is subject to its lawful terms." *Id.* at A-19 n.2.

Notwithstanding his express warranties at the time of purchase, almost immediately after purchasing the nomination, petitioner consigned it to be offered for sale at Matchmaker's November 10, 1985 auction, setting a reserve price of $125,000. *Id.* at A-2. In October 1985, having been advised to do so by Matchmaker, petitioner contacted Goodbody informing him of petitioner's plans to sell a SHAREEF DANCER nomination at Matchmaker's

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least five thoroughbred seasons in each of the past two years. *See* Pet. at A-19 n.2.

[3] Stallion seasons are generally sold on a "no guarantee" or a "live foal" basis. A no guarantee sale requires payment immediately and, as the name implies, carries no guarantee that the mare to be bred will get in foal. Conversely, with live foal seasons, the full purchase price is ordinarily not due until October 1st following the breeding or upon the birth of a live foal. In the event the mare slips or aborts the foal any amount paid is refunded to the purchaser and nothing further is due. Due to the increased risk assumed by the purchaser in a no guarantee situation, a no guarantee season is usually valued at 2/3 of the price of a live foal season in the same stallion. Sales of seasons at the Matchmaker auction or through its Exchange are conducted only on a "no guarantee" basis.

November 10, 1985 auction and was informed by Goodbody that this violated the Syndicate Agreement. Pet. at A-2. As the court of appeals found, Goodbody expressly "notified Matchmaker of the violation of the 'no auction' clause. . . ." *Id.* Thereafter, as the court of appeals also found, "Matchmaker itself withdrew the nomination from auction" in keeping with its own "policy to abide by the terms of syndicate agreements,[4] and its rules. . . ." *Id.*[5]

At the time Matchmaker withdrew the nomination from the auction, petitioner had "the alternatives of selling the nomination through listing it on Matchmaker's weekly bid-and-ask exchange, through a bloodstock agent, through advertisements in newspapers and trade journals, and other private contacts." *Id.* at A-2-A-3. In fact, petitioner had earlier listed the nomination with a bloodstock agent and made at least one additional attempt to sell the nomination privately in the week prior to the Matchmaker auction. *Id.* at A-20. Thereafter, petitioner listed the nomination on the Matchmaker Exchange beginning November 25, 1985, at an initial asking price of $125,000, no guarantee. *See id.* at A-3, A-8, A-20. Petitioner "received no offers despite reducing the listing

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[4] When he purchased the nomination, petitioner was aware of Matchmaker's policy not to sell seasons or shares at auction with respect to stallions whose syndicate agreements prohibited such sales. Indeed, petitioner, in the mistaken belief that the SEATTLE SLEW syndicate agreement proscribed sales at auction, had consigned a season in that stallion to the November, 1984, Matchmaker auction, conditioning that consignment on the adoption of an amendment of the SEATTLE SLEW syndicate agreement to permit sales at auction. *See* Pet. at A-19 n.2.

[5] Under the terms of the Conditions of Sale governing its auctions, Matchmaker could decline to sell the nomination at any time and for any reasons which it, in its sole discretion, deemed appropriate. Pet. at A-25.

price, and finally sold the nomination privately for $90,000 in February 1986." Pet. at A-3.

2. The Decisions Below

a. The district court holding

After Matchmaker withdrew the nomination from the auction, petitioner filed this action in the United District Court for the Eastern District of Kentucky charging defendants with a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and tortious interference with contract and prospective advantage. After months of extensive discovery and upon the filing of cross motions for summary judgment, the district court rejected petitioner's contention that the no-auction provision should be declared a *per se* violation of the Sherman Act, 15 U.S.C. § 1, noting that "[i]t simply is not apparent on its face that this contract provision works to 'fix and stablilize' prices." *Id.* at A-18.[6] The district court concluded that petitioner "ha[d] not mustered enough factual evidence to withstand the defendants' motion for summary judgment in regard to Sec. 1 of the Sherman Act. . . ." *Id.* In so concluding, the district court also found that petitioner "ha[d] not suffered an injury such as federal antitrust legislation is designed to remedy." *Id.* The district court specifically found that petitioner failed to demonstrate that "the no auction provision caused him to suffer a loss in regard to the 1986 nomination he purchased" and that petitioner "fail[ed] to demonstrate that

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[6] Petitioner initially sought to have the entirety of paragraph 13 of the Syndicate Agreement declared a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The district court, however, found that "nothing in the record substantiates that the plaintiff has a claim under subparagraphs (a), (b) or (c)" of the Syndicate Agreement. Pet. at A-16. On appeal, petitioner did not challenge that finding and limited his attack to the district court's findings with respect to paragraph 13(d), the no-auction provision. Accordingly, that was the only provision before the court of appeals.

the no auction clause affects the free play of the market in SHAREEF DANCER seasons." Pet. at A-19.

The district court held that "[i]f the purpose of the no auction clause is to keep the price of SHAREEF DANCER shares unnaturally high then petitioner is not injured by such a clause." *Id.*, citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582-83 (1986). The district court further reasoned that "[i]f the purpose . . . is to keep prices unnaturally low, then the . . . syndicate members are economic fools, or devious schemers . . . and [petitioner] 'must come forward with more persuasive evidence to support [his] claim than would otherwise be necessary.'" *Id.*, citing *Matsushita*, 475 U.S. at 587.

Noting petitioner's reserve of $125,000, the district court found that petitioner "failed to present evidence that his nomination was competitively priced so that it would have sold had it been offered at auction." *Id.* The district court concluded that petitioner "must present some evidence more than 'mere conjecture' that he would have been able to sell his nomination at auction for at least $125,000.00, no guarantee." *Id.* at A-20.

The district court also found that petitioner failed to establish that the general purpose and effect of the no-auction clause are to stabilize and fix the price of SHAREEF DANCER seasons. *Id.* The district court noted that "the evidence in the record indicates that the Matchmaker auction is just one of many ways in which a thoroughbred stallion nomination can be sold and thus a no auction clause does not deprive a purchaser 'of the advantages which . . . derive from free competition.'" *Id.* at A-21. With respect to appellant's antitrust claims, the court concluded that (*id.* at A-24):

> The no auction clause in the SHAREEF DANCER Syndicate Agreement is limited in scope. It only affects one aspect of thoroughbred stallion season

> sales. Even if the market area is narrowly defined as the market for nominations of SHAREEF DANCER, there seems to be no appreciable suppression of competition. No auction clauses are not uncommon in the thoroughbred industry. And SHAREEF DANCER is certainly not the only stallion in the world. If the market area is widened to include what is still a highly specialized market—thoroughbred stallion nominations—the effect is negligible. The Court must conclude therefore that the no auction clause in the SHAREEF DANCER Syndicate Agreement does not unduly restrain trade or fix prices.

b. The court of appeals holding

On appeal from the district court's grant of summary judgment, petitioner, rehearsing the arguments he now makes to this Court, argued that the district court had failed to consider his "evidence" with respect to the alleged unlawful intent and effect of the no-auction provision as well as his "evidence" of injury. *See* Pet. at 6. After considering precisely the same "evidence" and arguments which were first presented to the district court and which petitioner now presents to this Court, the court of appeals, in a unanimous opinion, held:

> [w]e find that summary judgment was properly granted; there was no genuine issue of material fact and defendants were entitled to judgment as a matter of law. Defendants did not engage in any *per se* illegal activity, there was no appreciable suppression of competition under a rule of reason analysis, and the requisite elements of the Kentucky law tort claims were not met. We affirm.[7]

Id. at A-1-A-2.

In reaching that result after a careful analysis of petitioner's claims, the court of appeals held that petitioner's claims failed for three distinct reasons (*id.* at A-5):

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[7] Petitioner does not seek review of the affirmance of the district court's rulings with respect to the Kentucky law tort claims.

> First, plaintiff has failed to show that proscribing sales at Matchmaker's auction allows the Syndicate to fix or stabilize prices. Second, Matchmaker's 'public auction' is actually private. A number of equally accessible sales channels for a nomination exist, including Matchmaker's weekly bid-and-ask listing, which reaches more members than its 'public' auction. Third, plaintiff has failed to demonstrate an injury even under a *per se* analysis.

Just as the district court had found on the same record, the court of appeals found that there were several selling channels in addition to the listings on Matchmaker including "sales through a bloodstock agent, through advertisements in newspapers and trade journals, and other private contacts." Pet. at A-7. In so holding, the court of appeals expressly noted that "[s]uch contacts are no more 'private' than Matchmaker's members-only auction." *Id.*

Concluding that this was not a *per se* case, the court of appeals next examined the alleged unlawful purpose and anti-competitive effect of the no-auction clause. Again agreeing with the district court, the court of appeals concluded that "[t]he record discloses no genuine issue as to either." *Id.* at A-8. Although petitioner failed to define a relevant product market (or even to attempt such a definition), the court of appeals concluded that, however the product market is defined, "the 'no auction' clause cannot conceivably have the requisite anticompetitive effect given that it is limited to one thoroughbred stallion." *Id.* at A-9.

REASONS FOR DENYING THE WRIT

I. THE DECISIONS BELOW ARE WHOLLY CONSISTENT WITH THE REQUIREMENTS OF RULE 56 AND THE DECISIONS OF THIS COURT.

Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment when the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as

a matter of law." This Court has repeatedly emphasized the importance of granting summary judgment when the material facts are not genuinely at issue. In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), for example, this Court explained that (*id.* at 327):

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Similarly, in *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), this Court rejected a court of appeals decision reversing the trial court's grant of summary judgment. In finding that the court of appeals had imposed an insufficient burden on the party opposing the motion for summary judgment, this Court explained the circumstances in which summary judgment is appropriate. This Court indicated that "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." 477 U.S. at 247-48 (emphasis in original).[8] This Court explained that to create a gen-

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[8] This Court explained that the court of appeals had erred by failing to consider the appellant's burden at trial—which in that case required clear and convincing evidence of malice—in determining the appropriateness of summary judgment. *See* 477 U.S. at 254 ("[T]here is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence").

uine issue as to the material facts, the nonmoving party cannot rely on evidence that "is merely colorable" or "is not significantly probative," *id.* at 249-50; instead, there must be "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* at 249. Thus, the existence of *some* evidence which supports the nonmoving party's version of the facts will not be sufficient to defeat a motion for summary judgment unless the evidence offered by the nonmoving party *would be sufficient to justify a jury verdict for the nonmoving party.*

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), this Court held that, as a matter of law, the Third Circuit had erred in reversing a grant of summary judgment in an antitrust case. This Court emphasized that evidence offered by a nonmoving party that simply creates "some metaphysical doubt as to the material facts" is insufficient to avoid summary judgment. *Id.* at 586. This Court indicated that "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Id.* at 587.

In this case, as the courts below have repeatedly found, petitioner has developed no factual record which would lead a rational trier of fact to find that the no-auction clause had any impact on competition or that he has suffered any injury at all. By choosing to sell the nomination through Matchmaker, a private membership organization, petitioner effectively limited his potential market to Matchmaker members or individuals acting through Matchmaker members. The sole basis for petitioner's "injury" claim is his contention, unsupported by any evidence, that if he had been able to offer a SHAREEF DANCER nomination to Matchmaker's membership in an auction format, rather than on the Exchange, privately, or through bloodstock agents—as he in fact did—he would have sold it for a price equal to or in excess

of his intended reserve of $125,000. Concluding that petitioner had presented no evidence that would establish that he would have sold the nomination to a Matchmaker member or anyone else for $125,000 or more, the district court granted respondents' motion for summary judgment. Reviewing the same evidence and considering the same arguments which petitioner now presents to this Court, the court of appeals unanimously affirmed the district court's grant of summary judgment.

In urging this Court to grant *certiorari*, petitioner disingenuously argues that the no-auction provision precludes SHAREEF DANCER nominations from exposure to the so-called "public market," thereby permitting syndicate managers to control and stabilize prices for nominations. Pet. at 2-8. Not surprisingly, petitioner utterly fails to explain how that is accomplished. Notwithstanding petitioner's patently false assertion to the contrary (*id.* at 2), the no-auction provision does not preclude the sale of seasons on exchanges such as those operated by Matchmaker and Stallion Access, which petitioner erroneously defines as "public" markets.[9] Having decided to sell to Matchmaker members, petitioner had access to precisely the same potential purchasers by selling on the Exchange as he did through the auction. Moreover, as the court of appeals expressly found, the Exchange represented an even larger actual market than the auction because the entire membership of Matchmaker could bid on the Exchange whereas only those members actually present in Lexington at the auction could bid in the auction. *See id.* at A-5. Indeed, when

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[9] While petitioner makes much of his alleged foreclosure from the so-called "public market," Matchmaker, to the contrary, is a private membership organization. Indeed, the court of appeals expressly found that Matchmaker's auction was in fact a "private" auction. Pet. at A-7. Petitioner's persistence in arguing to this Court that the Matchmaker auction is a "public" auction or market flies in the teeth of both the express findings of the courts below and the undisputed facts of record. *See id.* at A-5, A-23.

Matchmaker withdrew the nomination from the auction, petitioner repeatedly listed it on the Matchmaker Exchange *at prices chosen by him* and those listings were published to all Matchmaker members. *See Pet.* at A-3, A-8.

As the courts below clearly found, the no-auction provision in the SHAREEF DANCER Syndicate Agreement does not unreasonably limit the marketability of nominations. One can, for example, sell a nomination privately, through a bloodstock agent, through the syndicate secretary or by listing it on the Matchmaker Exchange, Stallion Access or similar exchanges, or by placing an advertisement in a newspaper or trade journal. It is undisputed that petitioner availed himself of several of these options. *Id.* at A-7, A-8.[10] In each instance, petitioner determined his asking price and no one attempted to dictate a price to him.

After full discovery, the undisputed facts of record in this case establish beyond cavil that petitioner cannot demonstrate that he has suffered any "injury" whatsoever. That is precisely what both the district court and the court of appeals found. For all of his allegations of fixing and stabilizing prices and being denied access to a "free and open market," petitioner utterly fails to present any facts which would tend to show that respondents engaged in price fixing or stabilization or denied him ac-

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[10] *See, e.g., Fran Welch Real Estate Sales, Inc. v. Seabrook Island Co.*, 809 F.2d 1030, 1032 (4th Cir. 1987) (Prohibitions against all commercial signs including, "For Rent", "For Sale," and other similar signs imposed by board of directors of property owners' association in order to maintain the non-commercial character of housing development held not to be an unreasonable restraint of trade because real estate dealers could still advertise in regional and national publications and there were "almost infinite means by which real estate dealers contact potential customers, and the plaintiff itself has enjoyed considerable success in doing so").

cess to any potential purchasers.[11] Indeed, far from establishing that respondents have engaged in any conduct which could constitute a *per se* antitrust violation, the undisputed facts clearly demonstrate that the district court was correct in granting respondents summary judgment with respect to petitioner's antitrust claims and that the court of appeals was correct in affirming that judgment. As the court of appeals correctly found, "this is not . . . a *per se* case" and "the record discloses no genuine issue as to either" unlawful purposes or anticompetitive effect. Pet. at A-8.

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[11] It is telling that petitioner attempts to demonstrate that the effect of the SHAREEF DANCER Syndicate Agreement's no-auction provision is to stabilize prices by relying on the testimony of the late Leon Peters who claimed he had been restrained by virtue of the no-auction provisions in three other syndicate agreements to which he was a party. Mr. Peters' apparent affection for auctions was based upon his belief that occasionally people "lose their marbles. . . ." Pet. at 8. (The Matchmaker auction is an event where, as the district court noted, "strong drink [is] provided." *Id.* at A-21 n.3). On deposition, Mr. Peters testified that he was totally unaware of the terms of the syndicate agreements until he was told by petitioner. The sole basis for his understanding of the agreements was what he was told by petitioner, and he had never even attempted to sell the shares or nominations. Indeed, Peters testified that, as he understood the no-auction provision, it meant that he could not sell the shares at all. Such misinformed statements are hardly sufficient to meet petitioner's burden. While cited by petitioner, Mr. Weisbord's testimony to the effect that having seasons or shares subject to the Matchmaker marketplace, would give a better indication of "true value" than could be achieved in the absence of a market such as Matchmaker offers petitioner little comfort in light of the undisputed facts of this case. *Id.* at 6-7. Petitioner's 1986 SHAREEF DANCER nomination was repeatedly offered on the Matchmaker Exchange and, even after several reductions in the asking price, petitioner was unable to find a single Matchmaker member willing to pay his asking price for the SHAREEF DANCER nomination. *Id.* at A-3, A-8.

II. THE COURTS BELOW PROPERLY FOUND THAT PETITIONER FAILED TO DEMONSTRATE THAT HE HAS BEEN INJURED IN FACT.

An essential element of any claim for damages is the fact of injury. In this case, the whole predicate for petitioner's damage claim is *his* alleged expectation of profit flowing from his purchase of a SHAREEF DANCER nomination on the Matchmaker Exchange for the purpose of reselling it at a Matchmaker auction to be held nine months later. That alleged expectation of profit from such a resale is directly contrary to express warranties made by petitioner.[12]

Apart from the fact that petitioner's theory of injury is wholly inconsistent with his express warranties, it would be the sheerest speculation to assume that petitioner would have fared any better in offering the season to a subset of the Matchmaker membership actually in attendance at an auction than he did in offering it repeatedly to the *entire* membership on the Exchange. Petitioner's self-serving optimism concerning the price which he expected the season to fetch is no substitute for proof of injury.

It is undisputed that, both before and after the Matchmaker November 10, 1985 auction, petitioner had the option of listing the season on the Matchmaker Exchange thereby having access to precisely the same market (the Matchmaker membership) he now claims was foreclosed to him, as well as the option of selling the season privately himself, or through a bloodstock agent or through a variety of other means. It is also undisputed that

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[12] When petitioner purchased the SHAREEF DANCER nomination on the Exchange, he expressly warranted, that "he 'read and understand[s] . . . the Syndicate Agreement for the stallion and understand[s] that he or she is subject to its lawful terms,' and that he was purchasing 'for breeding purposes, and is not purchasing with a view toward resale of the share or season.'" Pet. at A-19 n.2.

petitioner utilized several of the options available to him in his effort to sell the nomination. In July 1985, he unsuccessfully attempted to sell the nomination through Mr. Harris, a bloodstock agent, for $160,000, no guarantee.[13] On November 5, 1985, just five days prior to the auction, petitioner attempted unsuccessfully to sell the nomination privately. *See* Pet. at A-20. In addition, beginning the week of November 25, 1985, petitioner listed the nomination on the Exchange for $125,000, and continued to list the nomination with periodic reductions in his asking price until January 6, 1986. *See id.* at A-3, A-8. Petitioner finally sold the nomination privately in February 1986 for $90,000, no guarantee. *Id.* at A-3. In view of petitioner's experience in attempting to sell the SHAREEF DANCER nomination both before and after the auction, nothing but the sheerest speculation could lead any reasonable trier of fact to conclude that petitioner would have had any better luck selling the nomination to Matchmaker's membership in an auction than he did in attempting to sell it to that same membership on the Exchange.[14] Such speculation simply cannot be the basis for damages, antitrust or otherwise.

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[13] Petitioner relies upon an affidavit of Mr. Harris as "evidence" of his injury. Pet. at 9. Mr. Harris' affidavit, however, which merely states that Harris thought at the time he was asked to try to sell the nomination (July 1985) that $160,000, no guarantee, was a "marketable price," does not establish that a Matchmaker member was prepared to purchase such a nomination for at least $125,000, no guarantee, in November 1985 or thereafter. Moreover, while Harris may well have thought that $160,000, no guarantee, was a "marketable price," the fact is that he was unable to sell the nomination at that price. Furthermore, there is absolutely no basis for petitioner's characterization of Harris' affidavit as "expert testimony in the record." Petitioner made no attempt to qualify Harris as an expert, to take his deposition or even to list him as a witness to be called at trial.

[14] Petitioner points to two instances in which no-guarantee seasons sold for more than $100,000, no guarantee, as establishing injury. Pet. at 9. However, on the basis of undisputed record

Indeed, as the court of appeals held in concluding that the district court was justified in granting summary judgment, "'[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.'" Pet. at A-8, quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). That holding is also wholly consistent with this Court's holding that a party resisting summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Moreover, "[w]hen the fact of injury is in issue, the 'isolated self-serving statements of a [plaintiff] may not provide substantial evidence upon which a jury can rely.'" *H&B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 247 (5th Cir. 1978) (quoting *Yoder Bros., Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1371 & n.25 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); *accord*, *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 714 (11th Cir. 1984).

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evidence, both courts below found that those instances involved special agreements which had been reached long before the 1986 season. *See id.* at A-8, A-20. It is undisputed that at the time of the auction, the going rate for SHAREEF DANCER nominations was $150,000, live foal, and $100,000, no guarantee, far below petitioner's reserve of $125,000, no guarantee. Thus, the fact that the going rate in November 1985, of $100,000, no guarantee, is $10,000 more than petitioner realized when he finally sold it in 1986 is of no moment because petitioner's $125,000 reserve meant that the nomination would not be sold at auction unless a Matchmaker member had bid at least $125,000.

III. PETITIONER ATTEMPTS TO CHARACTERIZE THIS AS A PRICE STABILIZATION CASE IN ORDER TO CONCEAL HIS INABILITY TO ESTABLISH INJURY.

While petitioner's petition and numerous complaints are replete with antitrust buzz words such as "price-fixing" and "stabilization," petitioner failed to provide the most rudimentary information needed by the court to assess the relevance of these buzz words to the conduct alleged.[15] For example, petitioner failed to give a clue as to the product market that is allegedly restrained by the no-auction provision. Is it the market of all thoroughbred stallion nominations or just SHAREEF DANCER nominations? As both courts below expressly found, regardless of which market definition one selects, competition in that market has not been adversely affected by

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[15] As the court pointed out in *Parmelee Transportation Co. v. Keeshin*, 292 F.2d 794, 804 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961),

> [T]he use of conventional antitrust language in drafting a complaint will not extend the reach of the Sherman Act to wrongs not germane to that act. . . . The antitrust laws were never meant to a panacea for all wrongs.

The standard for determining what combinations involve the prohibited degree of harm is nowhere spelled out in specific terms. It is clear, however, that plaintiff has a burden to show more than a *de minimis* restraint. As Justice Frankfurter pointed out in his concurring opinion in *Associated Press v. United States*, 326 U.S. 1 (1945),

> [E]ver since the Sherman Law was saved from stifling literalness by 'the rule of reason,' it is not sufficient to find a restraint. The decision question is whether it is an unreasonable restraint.

Id. at 27 (Frankfurter, J., concurring) (citations omitted). The Sherman Act "was designed to prevent restraints of trade which [have] a significant effect on . . . competition." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 n.15 (1940). Petitioner has not shown and indeed cannot show how competition has been restrained by a no-auction provision in the SHAREEF DANCER Syndicate Agreement.

the no-auction provision in the SHAREEF DANCER syndicate agreement. Pet. at A-9. Moreover, as this Court has made clear, it is the objective of the antitrust laws to protect competition, not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). One of the goals of competition is to produce goods at the lowest cost to consumers. Petitioner fails to explain how that goal is achieved by selling a SHAREEF DANCER nomination in an auction setting which intentionally restricts supply and permits the seller to "surreptiously bid on his own [season]." Pet. at A-7. Nor does petitioner explain what efficiencies beneficial to society as a whole or the thoroughbred industry in particular are derived from compensating a claim for damages predicated upon what until recently was a claim that, but for respondents' alleged conspiracy, petitioner would have been able to sell a nomination at a price higher than petitioner claimed was an already artificially enhanced price.[16]

The antitrust laws were not promulgated to protect the acquisition of supra-supracompetitive prices through artificially limiting supply, as the Matchmaker auction requires, and sham bidding, which the Matchmaker auction permits. *See id.* at A-7. Moreover, as this Court has

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[16] The gravamen of petitioner's first three complaints was that respondents conspired to prevent the sale of SHAREEF DANCER nominations at auction in order to fix the price of such nominations at an artificially high level and that petitioner was "injured," not as a result of paying an artificially high price for the nomination, but as a result of being unable to sell it at a price even higher than the allegedly artificially enhanced price. Complaint, ¶ 15 (App. 1a); First Amended Complaint, ¶ 24 (*id.*); Second Amended Complaint, ¶ 21 (*id.*). In his third amended complaint, petitioner, apparently recognizing that the "injury" alleged in the first three complaints did not constitute antitrust type injury, no longer alleges that respondents conspired to fix the prices of SHAREEF DANCER shares and nominations at artificially enhanced levels. Petitioner's most recent amendment, however, has not overcome the defects in his antitrust claim. *See* Pet. at A-6.

made clear, a competitor cannot recover damages for a conspiracy to charge higher than competitive prices, because a competitor would only stand to gain from any conspiracy to raise the market price, whether that is done through direct price-fixing or nonprice restrictions. *Matsushita*, 475 U.S. at 582-83. Similarly, as the district court found, any effort, legal or otherwise, to maintain or enhance the value of SHAREEF DANCER nominations could only benefit petitioner as an owner of a SHAREEF DANCER nomination. Pet. at A-19.

Clearly, petitioner has brought this suit as a competitor and not as a consumer. Indeed, he does not seek a recovery based on a claim that he paid too much for the nomination (*i.e.*, the difference between what he paid for the nomination and an allegedly lower price which the "freely competitive market" would have established for the nomination).[17] Petitioner's belated and all-too-transparent attempts "to characterize this as a price *stabilization* case" are, as the court of appeals correctly noted, "an attempt to escape the rule that there is no antitrust injury if a conspiracy actually tends to benefit a plaintiff." *Id.* at A-6 (emphasis in original) citing *Matsushita*, 475 U.S. at 585-86. For if, as petitioner has contended, the effect of the no-auction provision is to artificially enhance prices, petitioner, a competitor of respondents in the sale of SHAREEF DANCER nominations, cannot claim injury thereby. *Matsushita*, 475 U.S. at 582-83.

* * * *

In purchasing the nomination with the intent of reselling it in contravention of his express warranties as a

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[17] Petitioner's claim is, of course, based solely on speculation and can hardly substitute for evidence of the requisite injury in fact. *See Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1195-96 (6th Cir. 1982), *cert. denied*, 466 U.S. 931 (1984) (holding that injury to plaintiff is a necessary element in a cause of action for damages brought under § 1 of the Sherman Act).

Matchmaker member, petitioner bet that he could flout the Matchmaker rules and regulations by which he had agreed to be bound. He also bet that some other Matchmaker member would be willing to pay more than $125,000 for the nomination which he purchased for $100,000. Despite repeated offers to sell the nomination to Matchmaker's *entire* membership at various prices ranging from $99,000 to $125,000, he found no takers. While petitioner lost his bet, he was not the first and undoubtedly will not be the last person to lose a bet on a horse. That fact, however, does not give rise to an antitrust violation and certainly does not present an issue worthy of this Court's consideration.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: April 14, 1989

APPENDIX

COMPLAINT

15. As a direct and proximate result of the conduct of defendants described above, the public at large has been injured in that prices for thoroughbred stallion shares and nominations have been artificially enhanced and fixed, and the public has been deprived of the best possible stallion shares at prices fixed and established by supply and demand in a freely competitive market.

FIRST AMENDED COMPLAINT

24. As a direct and proximate result of the conduct of defendants described above, the public at large has been injured in that prices for thoroughbred stallion shares and nominations have been artificially enhanced and fixed, and the public has been deprived of the best possible stallion shares at prices fixed and established by supply and demand in a freely competitive market.

SECOND AMENDED COMPLAINT

21. As a direct and proximate result of the conduct of defendants described above, the public at large has been injured in that prices for Shareef Dancer shares and nominations have been artificially enhanced and fixed, and the public has been deprived of Shareef Dancer shares and nominations at the best possible prices fixed and established by supply and demand in a freely competitive market.